

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ABEL G. ROCHA,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security<sup>1</sup>,

Defendant.

NO: 12-CV-0336-TOR

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary  
judgment (ECF Nos. 20, 24). Plaintiff is represented by Lora Lee Stover.

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<sup>1</sup>Carolyn W. Colvin became the Acting Commissioner of Social Security on  
February 14, 2013. Under Rule 25(d) of the Federal Rules of Civil Procedure,  
Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit.  
No further action need be taken to continue this suit by reason of the last sentence  
of 42 U.S.C. § 405(g).

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT ~ 1

1 Defendant is represented by Erin F. Highland. The Court has reviewed the  
2 administrative record and the parties' completed briefing and is fully informed.  
3 For the reasons discussed below, the Court grants Defendant's motion and denies  
4 Plaintiff's motion.

#### 5 JURISDICTION

6 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g);  
7 1383(c)(3).

#### 8 STANDARD OF REVIEW

9 A district court's review of a final decision of the Commissioner of Social  
10 Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is  
11 limited: the Commissioner's decision will be disturbed "only if it is not supported  
12 by substantial evidence or is based on legal error." *Hill v. Astrue*, 688 F.3d 1144,  
13 1149 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means  
14 relevant evidence that "a reasonable mind might accept as adequate to support a  
15 conclusion." *Id.* (quotation and citation omitted). Stated differently, substantial  
16 evidence equates to "more than a mere scintilla[,] but less than a preponderance."  
17 *Id.* (quotation and citation omitted). In determining whether this standard has been  
18 satisfied, a reviewing court must consider the entire record as a whole rather than  
19 searching for supporting evidence in isolation. *Id.*

1 In reviewing a denial of benefits, a district court may not substitute its  
2 judgment for that of the Commissioner. If the evidence in the record “is  
3 susceptible to more than one rational interpretation, [the court] must uphold the  
4 ALJ’s findings if they are supported by inferences reasonably drawn from the  
5 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district  
6 court “may not reverse an ALJ’s decision on account of an error that is harmless.”  
7 *Id.* at 1111. An error is harmless “where it is inconsequential to the [ALJ’s]  
8 ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted).  
9 The party appealing the ALJ’s decision generally bears the burden of establishing  
10 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

#### 11 FIVE-STEP SEQUENTIAL EVALUATION PROCESS

12 A claimant must satisfy two conditions to be considered “disabled” within  
13 the meaning of the Social Security Act. First, the claimant must be “unable to  
14 engage in any substantial gainful activity by reason of any medically determinable  
15 physical or mental impairment which can be expected to result in death or which  
16 has lasted or can be expected to last for a continuous period of not less than twelve  
17 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be  
18 “of such severity that he is not only unable to do his previous work[,] but cannot,  
19 considering his age, education, and work experience, engage in any other kind of  
20

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §  
2 1382c(a)(3)(B).

3 The Commissioner has established a five-step sequential analysis to  
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§  
5 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner  
6 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);  
7 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the  
8 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
9 404.1520(b); 416.920(b).

10 If the claimant is not engaged in substantial gainful activities, the analysis  
11 proceeds to step two. At this step, the Commissioner considers the severity of the  
12 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the  
13 claimant suffers from “any impairment or combination of impairments which  
14 significantly limits [his or her] physical or mental ability to do basic work  
15 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);  
16 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,  
17 however, the Commissioner must find that the claimant is not disabled. *Id.*

18 At step three, the Commissioner compares the claimant’s impairment to  
19 several impairments recognized by the Commissioner to be so severe as to  
20 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§

1 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more  
2 severe than one of the enumerated impairments, the Commissioner must find the  
3 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

4 If the severity of the claimant's impairment does meet or exceed the severity  
5 of the enumerated impairments, the Commissioner must pause to assess the  
6 claimant's "residual functional capacity." Residual functional capacity ("RFC"),  
7 defined generally as the claimant's ability to perform physical and mental work  
8 activities on a sustained basis despite his or her limitations (20 C.F.R. §§  
9 404.1545(a)(1); 416.945(a)(1)), is relevant to both the fourth and fifth steps of the  
10 analysis.

11 At step four, the Commissioner considers whether, in view of the claimant's  
12 RFC, the claimant is capable of performing work that he or she has performed in  
13 the past ("past relevant work"). 20 C.F.R. §§ 404.1520(a)(4)(iv);  
14 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the  
15 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
16 404.1520(f); 416.920(f). If the claimant is incapable of performing such work, the  
17 analysis proceeds to step five.

18 At step five, the Commissioner considers whether, in view of the claimant's  
19 RFC, the claimant is capable of performing other work in the national economy.  
20 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,

1 the Commissioner must also consider vocational factors such as the claimant's age,  
2 education and work experience. *Id.* If the claimant is capable of adjusting to other  
3 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
4 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other  
5 work, the analysis concludes with a finding that the claimant is disabled and is  
6 therefore entitled to benefits. *Id.*

7 The claimant bears the burden of proof at steps one through four above.  
8 *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If  
9 the analysis proceeds to step five, the burden shifts to the Commissioner to  
10 establish that (1) the claimant is capable of performing other work; and (2) such  
11 work "exists in significant numbers in the national economy." 20 C.F.R. §§  
12 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 676 F.3d 1203, 1206 (9th Cir.  
13 2012).

#### 14 ALJ'S FINDINGS

15 At step one, the ALJ found that Plaintiff has not engaged in substantial  
16 gainful activity since February 1, 2008, the alleged onset date. Tr. 28. At step  
17 two, the ALJ found that Plaintiff has the following severe impairments: chronic  
18 pain status post right leg sarcoma removal, cervical arthritis, degenerative disc  
19 disease, adjustment disorder, and avoidant personality disorder. Tr. 28-29. At step  
20 three, the ALJ concluded that the claimant does not have an impairment or

1 combination of impairments that meets or medically equals an impairment listed in  
2 20 C.F.R. Pt. 404, Subpt. P, app. 1. Tr. 29-31. As a result, the ALJ found that  
3 Plaintiff has the residual functional capacity ("RFC"),

4 to lift and/or carry up to 30 pounds occasionally and 15 pounds  
5 frequently, stand and/or walk up to six hours in an eight-hour  
6 workday, sit up to six hours in an eight-hour workday, and change  
7 position, sitting or standing, once an hour. The claimant cannot climb  
8 ladders, ropes or scaffolds and should avoid stairs and ramps. The  
9 claimant can have occasional contact with the public and perform  
10 simple repetitive one to three step tasks. The claimant is limited to  
11 jobs that do not require fine hearing capability.

12 Tr. 31-33. At step four, the ALJ found that the claimant is unable to perform any  
13 past relevant work. Tr. 33. At step five, the ALJ determined that considering the  
14 claimant's age, education, work experience, and RFC, there are jobs that exist in  
15 significant numbers in the national economy that the claimant can perform. Tr. 33-  
16 34. Finally, the ALJ concluded that Plaintiff is not disabled within the meaning of  
17 the Social Security Act. Tr. 34.

## 18 ISSUES

19 Plaintiff raises several issues for review, most of which relate to the ALJ's  
20 RFC assessment. First, Plaintiff contends the ALJ failed to consider Plaintiff's  
hearing loss as a severe impairment that should have been included in the RFC.  
Next, Plaintiff avers the ALJ improperly considered the credibility of Plaintiff's  
own testimony and the medical evidence provided by Dr. Ugorji and Dr. Arnold in

1 assessing Plaintiff's RFC. Lastly, Plaintiff contends the ALJ failed to pose a  
2 proper hypothetical to the vocational expert. *See* ECF No. 21 at 8.

### 3 DISCUSSION

#### 4 **A. Severe Impairments**

5 Plaintiff argues the ALJ erred in omitting his hearing loss from the list of his  
6 severe impairments at step two. ECF 21 at 14. While it is true that the ALJ did not  
7 specifically list hearing loss at step two, Tr. 28-29, she explicitly included it in both  
8 her RFC assessment and her hypothetical posed to the vocational expert. Tr. 31,  
9 72. Accordingly, Plaintiff was not prejudiced by the omission and the error was  
10 harmless. *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (holding that any  
11 error by the ALJ in neglecting to list an impairment at step two was harmless  
12 because the decision reflected that the ALJ considered any limitation posed by the  
13 limitation at step four).

#### 14 **B. Medical Evidence**

15 Plaintiff contends the ALJ failed to properly consider the opinions of Dr.  
16 Kinsley Ugorji, M.D. and Dr. John Arnold, Ph.D. in fashioning the RFC. A  
17 treating physician's opinion is entitled to "substantial weight." *Embrey v. Bowen*,  
18 849 F.2d 418, 422 (9th Cir. 1988). If evidence in the record contradicts the  
19 opinion of a treating physician, the ALJ must present "specific and legitimate  
20 reasons" for discounting the treating physician's opinion, supported by substantial



1 evidence. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir.  
2 2009) (quoting *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.1995)). Where a  
3 treating physician's medical opinion is not contradicted by the opinion of another  
4 physician, the ALJ must set forth clear and convincing reasons for disbelieving the  
5 treating physician. *Thomas v. Barnhart*, 278 F.3d 947, 956-57 (9th Cir. 2002).  
6 With these standards in mind, the Court will address the ALJ's consideration of the  
7 medical evidence.

8 1. Dr. Ugorji

9 Plaintiff contends that the ALJ failed to take into account all of the  
10 limitations identified by Dr. Ugorji when fashioning the RFC. Dr. Ugorji opined  
11 that Plaintiff's right thigh pain was mild to moderate in severity and affected  
12 Plaintiff's ability to sit, stand, walk, and lift. Tr. 259. He also noted that Plaintiff's  
13 back pain was generally mild. Tr. 259. He further opined that Plaintiff was  
14 restricted in his ability to bend, crouch, pull, and push, and should avoid heavy  
15 lifting and prolonged sitting and standing. Tr. 259. Dr. Ugorji, Plaintiff's treating  
16 physician, concluded that Plaintiff could perform light work and may benefit from  
17 vocational training. Tr. 259, 260.

18 The ALJ gave Dr. Ugorji's opinion "substantial weight" and, like Dr. Ugorji,  
19 concluded that Plaintiff was limited to performing light work in the RFC. As  
20 Defendant notes, any error that the ALJ committed in not explicitly considering the

1 weight of each standalone limitation in the RFC was harmless. *See Molina v.*  
2 *Astrue*, 674 F.3d at 1111 (error is harmless “where it is inconsequential to the  
3 [ALJ’s] ultimate nondisability determination.”). Both Dr. Ugorji and the ALJ  
4 operated under substantively similar definitions of “light work.” Dr. Ugorji  
5 defined “light work” as work that “may require walking or standing up to six out of  
6 eight hours per day, or involve sitting most of the time with occasional pushing and  
7 pulling of arm and/or leg controls.” Tr. 259. Similarly, the Social Security  
8 regulations define light work as “a good deal of walking or standing, or when it  
9 involves sitting most of the time with some pushing and pulling of arm or leg  
10 controls.” 20 C.F.R. §§ 404.1567(b); 436.967(b). The Court finds that the ALJ  
11 properly considered Dr. Ugorji’s opinion in formulating the RFC.

12 2. Dr. Arnold

13 Plaintiff also argues that the ALJ improperly gave substantial weight to Dr.  
14 Arnold’s opinion but did not include all of Dr. Arnold’s limitations in the RFC  
15 finding. Dr. Arnold opined that Plaintiff “should have no difficulty meeting the  
16 basic cognitive demands in the workplace.” Tr. 246. He stated Plaintiff would  
17 have difficulty when adjusting to new situations and, because of his difficulty with  
18 social interaction, he would likely be more successful in an environment not  
19 requiring significant public contact. Tr. 246. Accordingly, the ALJ limited  
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1 plaintiff to having only occasional contact with the public and performing simple,  
2 repetitive one to three step tasks. Tr. 31.

3 Plaintiff does not show how the ALJ's RFC finding is inconsistent with Dr.  
4 Arnold's opinion or what additional limitations should have been included in the  
5 RFC. *See* ECF 21 at 16. As a result, the Court declines to address the argument,  
6 as it was not briefed with sufficient particularity. *Carmickle v. Comm'r, Soc. Sec.*  
7 *Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (declining to address plaintiffs  
8 argument "because [plaintiff] failed to argue this issue with any specificity in his  
9 briefing.").

### 10 **C. ALJ's Evaluation of Plaintiff's Credibility**

11 Plaintiff next contends that the ALJ improperly discredited Plaintiff's  
12 testimony in assessing the RFC. Evaluating the credibility of a claimant's  
13 testimony regarding subjective pain requires the ALJ to engage in a two-step  
14 analysis. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). "First,  
15 the ALJ must determine whether the claimant has presented objective medical  
16 evidence of an underlying impairment which could reasonably be expected to  
17 produce the pain or other symptoms alleged." *Id.* at 1036 (internal citations and  
18 quotation marks omitted). The claimant is not required to show that her  
19 impairment "could reasonably be expected to cause the severity of the symptom  
20 she has alleged; she need only show that it could reasonably have caused some

1 degree of the symptom.” *Id.* (quoting *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th  
2 Cir. 1996)). If the claimant satisfies the first step and there is no evidence of  
3 malingering, the ALJ may only reject the claimant’s testimony about the severity  
4 of the symptoms by providing “specific, clear and convincing reasons” for the  
5 ejection. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

6 The ALJ may not reject the claimant’s subjective symptom testimony  
7 “simply because there is no showing that the impairment can reasonably produce  
8 the *degree* of symptom alleged.” *Lingenfelter*, 504 F.3d at 1036 (quoting *Smolen*,  
9 80 F.3d at 1282). Nor may the ALJ discredit the subjective testimony as to the  
10 severity of the symptoms “merely because they are unsupported by objective  
11 medical evidence.” *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.1998). On the  
12 other hand, “the medical evidence is still a relevant factor in determining the  
13 severity” of the claimant’s limitations. *Rollins v. Massanari*, 261 F.3d 853, 856  
14 (9th Cir. 2001).

15 Here, the ALJ found that Plaintiff’s nerve damage associated with the  
16 sarcoma (cancer) of the right leg, along with his neck arthritis and back problems,  
17 could reasonably be expected to cause the alleged pain. Thus, the ALJ was only  
18 permitted to reject Plaintiff’s testimony by providing specific, clear and convincing  
19 reasons for the rejection. *See Vasquez*, 572 F.3d at 591. On his Function Report,  
20 Plaintiff alleged that the impairment affects his ability to lift, squat, bend, stand,

1 reach, walk, sit, kneel, and stair climb. Tr. 149. He can only walk one-half block  
2 and sit and stand for thirty minutes. Tr. 149. He added that he does not handle  
3 stress well and has difficulty getting along with others. Tr. 150.

4 The Court finds the ALJ stated sufficiently specific reasons for not fully  
5 crediting Plaintiff's testimony. First, the ALJ noted that the medical evidence did  
6 not support the Plaintiff's allegation that he could not sustain work activity on a  
7 regular and continuing basis. Tr. 32. The ALJ noted that on January 6, 2010,  
8 Plaintiff was cleared by his oncologist, Dr. Steven Beyersdorft, M.D., to return to  
9 work without restrictions. Moreover, a physical examination by Dr. Ugorji noted  
10 that Plaintiff had good motor function in his right leg. Tr. 32, 202. Lastly, the ALJ  
11 observed that Plaintiff's cancer had not returned, Tr. 28, and that the associated  
12 nerve pain had been treated successfully with medicine, Tr. 201. The ALJ was  
13 entitled to rely on the medical evidence as a relevant *factor* in finding Plaintiff  
14 incredible. *See Rollins*, 261 F.3d at 856.

15 As additional support for discrediting Plaintiff's testimony, the ALJ found  
16 his alleged limited daily activities were both unverifiable and difficult to attribute  
17 to any medical condition. Tr. 32. Although the ALJ erred in relying upon this  
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1 finding,<sup>2</sup> she provided other sufficient reasons for discounting Plaintiff's  
2 testimony. *See Batson v. Comm'r of Social Sec. Admin.*, 359 F.3d 1190, 1197 (9th  
3 Cir. 2004). The ALJ observed that Plaintiff maintains good personal hygiene and  
4 uses public transportation. Tr. 30. The ALJ noted that he spends his afternoons  
5 and evenings watching television. Tr. 30. He was cooperative and pleasant with  
6 health care professionals, made good eye contact and had a normal affect, and  
7 exhibited good judgment and impulse control. Tr. 30. Taken together, the ALJ  
8 provided specific, clear and convincing reasons for not *fully* crediting the  
9 Plaintiff's own testimony about the severity of his symptoms for purposes of  
10 fashioning the RFC.

#### 11 **D. The RFC**

12 Because the Plaintiff's contention that the ALJ erred in fashioning the RFC  
13 is derivative of sections A, B, and C above, the Court also finds substantial  
14 evidence supports the ALJ's assessment of the RFC.

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19 <sup>2</sup> Defendant concedes that this was not a legitimate basis for discrediting Plaintiff's  
20 testimony. ECF No. 24 at 14.

### E. Hypothetical Posed to the Vocational Expert

The ALJ's hypothetical posed to the vocational expert accurately reflected the RFC finding. Tr. 31, 72. Because the Court finds that the RFC was proper, the hypothetical posed to the vocational expert was likewise free of error.

## CONCLUSION

The Court finds that the ALJ properly considered the medical evidence and the Plaintiff's own testimony in assessing the RFC. The ALJ's findings are supported by substantial evidence in the record and are free of harmful legal error.

**ACCORDINGLY, IT IS HEREBY ORDERED:**

1. Defendant's Motion for Summary Judgment, ECF No. 24, is

**GRANTED.**


2. Plaintiff's Motion for Summary Judgment, ECF No. 20, is **DENIED**.

3. The hearing set for March 17, 2014 is **VACATED**.

The District Court Executive is hereby directed to file this Order, enter Judgment for Defendant, provide copies to counsel, and **CLOSE** this file.

**DATED** May 2, 2013.



  
THOMAS O. RICE  
United States District Judge